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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 886.

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,
Appellants,

vs.

THE PORT OF NEW YORK AUTHORITY,
Appellee.

ELM LAND CO., INC.,
Appellant,

vs.

THE PORT OF NEW YORK AUTHORITY,
Appellee.

MOTION TO DISMISS THE APPEALS AND BRIEF.

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THE PORT OF NEW YORK AUTHORITY,

Appellee.

ELM LAND CO., INC.,

Appellant,

vs.

THE PORT OF NEW YORK AUTHORITY,

Appellee.

MOTION TO DISMISS THE APPEALS.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeals herein be dismissed on the grounds that the question presented by these appeals is so unsubstantial as not

to warrant further argument (Point I); that the Jurisdictional Statement does not comply with the Revised Rules of the Supreme Court of the United States (Point II); and that the federal question sought to be reviewed was not timely or properly raised in the trial court and in consequence thereof has become moot (Point III).

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The Port of New York Authority,
Attorney for Appellee.

Dated: May 8, 1961.

Brief of Appellee in Support of Motion to Dismiss the Appeals.

Introduction.

This Memorandum is submitted by appellee, The Port of New York Authority, in support of its motion to dismiss two appeals by appellants from the New Jersey Supreme Court's judgment affirming the trial court's action in sustaining, over appellants' belated objections, the constitutionality of N. J. S. A. 32:1-132.

Appellants contend that state legislation which accords the Port Authority, as condemnor, and not the appellants, as condemnees, a procedural option to have the amount of just compensation to which a condemnee is entitled determined either by a court or by a jury violates the Fourteenth Amendment's equal protection clause. Appellants make this contention in spite of the fact that they fail to show how this option can possibly prejudice them or deprive them of any right to which they may be entitled because they, in effect, concede, as they must, that either procedural option open to the Port Authority is perfectly constitutional since this Court as well as the state courts have uniformly held that there is no constitutional right to trial by jury in condemnation proceedings.

Accordingly, the Port Authority moves to dismiss these appeals on the ground that the alleged federal question is so unsubstantial as not to warrant consideration by this Court. Appellants' alleged federal question would *only* be substantial if either procedural option could in fact be shown to be unconstitutional. This, of course, cannot be done.

In addition, the Port Authority moves to dismiss these appeals on the grounds that they are not within this Court's jurisdiction because appellants' Jurisdictional Statement does not comply with Rule 15 (1) (d) and (e) of this Court and that the alleged federal question was not timely or properly raised in the trial court and in consequence thereof is now moot.

Statutes Involved.

N. J. S. A. 32:1-132, whose constitutionality is here challenged, was quoted in full by appellants in their Jurisdictional Statement, page 3. The critical portion of that statute is the second paragraph which reads in pertinent part as follows:

> "The Port Authority may acquire * * * such property, whether a fee simple absolute or a lesser interest by condemnation or the exercise of the right of eminent domain under and pursuant to the provisions of the condemnation law of the State of New York, in the case of property located in such State, and Revised Statutes of New Jersey, Title 20:1-1 et seq., in the case of property located in such State, or at the option of the Port Authority as provided in section 15 of chapter 43 of the laws of New Jersey, 1947, as amended, for the condemnation of real property for air terminal purposes, in the case of property located in such State, and as provided in section 15 of chapter 802 of the laws of New York, 1947, as amended, for the condemnation of real property for air terminal purposes, in the case of property located in such State, or pursuant to such other and alternate procedure as may be provided by law."

In this paragraph, the questioned procedural option is granted to the Port Authority to proceed either under N. J. S. A. 20:1-1 et seq. (sometimes referred to as Title 20) or under Section 15 of Chapter 43, Laws of New Jersey, 1947, as amended, N. J. S. A. 32:1-35.15 et seq. (sometimes referred to as the Airport Act).

Title 20 provides for a trial of the issue of just compensation before commissioners (N. J. S. A. 20:1-9, as amended) and thereafter on appeal it allows for a trial *de novo* before a jury (N. J. S. A. 20:1-16, as amended and N. J. S. A. 20:1-20, as amended). On the other hand, the Airport Act provides that the issue of just compensation shall be determined by a court (N. J. S. A. 32:1-35.15(i)). Contrary to the inference made by appellants on page 5, line 5, of their Jurisdictional Statement that only the landowner is prohibited from demanding a jury trial under N. J. S. A. 32:1-35.15(i) the fact is that under this subsection neither party—the condemning authority nor the landowner—can demand a jury trial.

Both Title 20 and the Airport Act provide for an appeal by either party as to any matter involved in the condemnation proceedings.

Options similar to the one challenged are also contained in other statutes relating to the Port Authority. Thus, the Port Authority's air terminal statute includes such an option (N. J. S. A. 32:1-35.5(c)) as does the condemnation procedure for Port Authority marine terminals (N. J. S. A. 32:1-35.33). The latter two statutes have been in effect for 14 years without challenge. The statutory sections here referred to are quoted in full in an appendix to this brief.

Counter-statement of the Case.

Appellee, The Port of New York Authority, is an agency of the States of New Jersey and New York, created in 1921 by Compact between them (Ch. 151, Laws of New Jersey, 1921; Ch. 154, Laws of New York, 1921; N. J. S. A. 32:1-1 to 24) consented to by Congress (Joint Resolution Aug. 23, 1921, 42 Stat. 174). See *Commissioner* v. *Shamberg's Estate*, 144 F. 2d 998 (2 Cir., 1944), *cert. denied*, 323 U. S. 792, 89 L. Ed. 631 (1944).

The present appeals arise out of the Port Authority's action in condemning property in Fort Lee, New Jersey, in the course of constructing improved approaches to the George Washington Bridge and its new Second Deck. This Bridge links Fort Lee, New Jersey, with the area known as Washington Heights in New York City. The appeals are brought by two property owners who owned five of the 40 parcels condemned.

Appellant, the Elm Land Co., Inc., was the former owner of two parcels lying entirely within a State highway easement. These parcels were for the most part about 18 feet under a state roadway and hence both legal and practical access to them was lacking. The trial court awarded Elm Land nominal damages totalling $1500 for these two parcels, $1,000 for one and $500 for the other.

Appellants, Elizabeth and John Cervieri, owned three parcels of property which the Port Authority acquired in these proceedings. After the hearing on just compensation for all three, the trial court rendered awards in the amount of $7,100 for the parcel described in Count 7 of the Complaint, $1,412 for the parcel described in Count 3 and

$133,145 for the parcel described in Count 10. Notwithstanding the fact that Count 10 involves the same alleged constitutional issue which Counts 3 and 7 raise, the Cerviers did not appeal from Count 10 presumably because they were satisfied with the compensation awarded them by the Court.

The bi-State legislation relating to the George Washington Bridge provides that the Port Authority may acquire real property for bridge purposes by exercise of the right of eminent domain under the provisions of the New York condemnation law, in the case of property located in New York, and under the provisions of N. J. S. A. 20:1-1, *et seq.*, in the case of property located in New Jersey, or at the option of the Authority, as specifically provided in N. J. S. A. 32:1-132, the Authority may proceed under the provisions of N. J. S. A. 32:1-35.15 (the Airport Act), or pursuant to such other alternate procedures as may be provided by law.

It is this procedural option accorded the Port Authority which forms the basis of appellants' contentions that their equal protection rights under the Fourteenth Amendment have been violated.

The Port Authority elected to acquire the 40 parcels located in Fort Lee, New Jersey, including the parcels involved in these appeals, pursuant to the option accorded it by N. J. S. A. 32:1-132 as provided in N. J. S. A. 32:1-35.15, the Airport Act.

The orders to show cause directed the named appellants to show cause "why an order should not be entered * * * providing that this Court determine without a jury and with a view of said real property, the compensation which

should justly be made to owners of said real property and should thereafter enter a judgment in the amount so determined."

The orders to show cause provided that title would vest in the appellee on September 5, 1958, the return date of the orders. This was about five (5) weeks after the filing of the complaints.

Upon the return date, September 5, 1958, the Cervieris appeared pro se and though appellants failed to mention it in their Jurisdictional Statement, The Elm Land Co., Inc. appeared by counsel since substituted for by present counsel.

No objection was made on the return date either by the Cervieris or by Elm Land's counsel to the vesting of title in the Port Authority or to the method set forth in the order to show cause for the assessment of just compensation.

In reliance on this, the Port Authority on October 27, 1958, commenced the construction of new and improved New Jersey approach roadways to the George Washington Bridge and its Second Deck.

It was not until the appellants' parcels came on for trial on the issue of just compensation, over one and a half years after the vesting of title in the Port Authority, that the constitutional question here urged was first raised. At this stage of the proceedings appellants in their notice of motion stated their intention to move "for an order granting said defendants [appellants] the right to demand trial by jury on the ground that R. S. 32:1-132 as amended * * * [was] unconstitutional in that it deprive[d] defendants [appellants] of equal protection under the laws."

However, the motion that was in fact argued by appellants was a motion to dismiss the respective complaints on the ground that N. J. S. A. 32:1-132 was unconstitutional in that it deprived them of equal protection of the laws. Appellants' motions were denied by the trial court without opinion.

The Port Authority had argued to the trial court that appellants' motions should be dismissed on two grounds: Firstly, because they were not timely made in that appellants had failed to appeal from the order vesting title in the Port Authority. Secondly, because the option accorded the Port Authority was perfectly constitutional.

Appellants appealed to the Appellate Division of the New Jersey Superior Court from the final judgments of the trial court awarding them compensation. The New Jersey Supreme Court on its own motion brought appellants' appeals directly to it. The New Jersey Supreme Court affirmed the judgments below. From that affirmance appellants appeal to this Court.

ARGUMENT.

POINT I.

The question presented by these appeals is not substantial.

The true reason for these appeals is not the denial of a substantial and fundamental right, but is merely a vehicle for securing to the appellants a re-hearing on the issue of just compensation. In *U. S. Surety Co.* v. *American Fruit Products Co.*, 238 U. S. 140, 142; 59 L. Ed. 1238, 1239 (1914), the Court said:

> "The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here."

As evidence of this, the Cervieris in their appeal to the State Court and to this Court have appealed from only two of the three awards made. The highest award of $133,145 remains unattacked.

If the procedure was unconstitutional as to the two lowest awards, why is it not unconstitutional with regard to the highest award? Appellants have complained of the unfairness of the treatment accorded them in these proceedings. However, it appears that the identical treatment accorded them in the hearing on just compensation which resulted in a relatively high award was not unfair.

Appellants have not been deprived of any right, substantial or otherwise, protected by the Constitution. The cases have uniformly held that the Due Process and Equal Protection Clauses of the Federal Constitution only protect fundamental or substantial rights. *Brown* v. *New Jersey*, 175 U. S. 172, 175, 44 L. Ed. 119 (1899); *Twining* v. *New Jersey*, 211 U. S. 78, 106, 53 L. Ed. 97 (1908); *Dohany* v. *Rogers*, 281 U. S. 362, 369, 74 L. Ed. 904 (1930); *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569, 42 L. Ed. 853 (1898); *Washington National Insurance Co.* v. *Board of Review*, 1 N. J. 545, 552 (1949); *Marin Municipal Water District* v. *North Coast Water Co.*, 178 Cal. 308, 173 Pac. 469, 472 (Sup. Ct., Cal., 1918).

The degree of substantiality of rights protected by *both clauses* is the same. Thus, if a right is not protected by the Due Process Clause because it is unsubstantial it will

not be protected by the Equal Protection Clause. *U. S.* v. *Heinze*, 218 U. S. 532, 546, 54 L. Ed. 1139 (1910).

The fundamental or substantial rights to which a landowner is entitled in a condemnation proceeding are summarized in *Nichols on Eminent Domain, Volume I* (3rd Ed.) page 315 as follows:

(a) Notice and opportunity to be heard

(b) Before a competent tribunal

(c) In an orderly proceeding which is:

(1) Adapted to the nature of the case

(2) In accord with established rules which do not violate fundamental rights.

And of course the necessity that just compensation be awarded.

Among the many precedents which have stated the fundamental rights in condemnation cases to be as set forth above are *Dohany* v. *Rogers, supra* (p. 369); *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co., supra* (p. 569); *Seacombe* v. *Milwaukee & St. Paul Railway Co.*, 23 Wall. 108, 117, 23 L. Ed. 67 (1874); *Fish* v. *Morgenthau*, 10 F. Supp. 613, 616 (U. S. D. C. N. H. 1935); *United States* v. *McIntosh*, 2 F. Supp. 244, 251 (U. S. D. C. Va. 1932).

Closely related to the question of what are substantial or fundamental questions in condemnation actions is the question of the extent to which the state legislature may prescribe procedures in condemnation.

Under this Court's decision in *Seacombe* v. *Milwaukee & St. Paul Railway Co., supra* (p. 117) as well as under such state court decisions as *State* v. *Fisher*, 54 N. J. Super.

274, 281, 148 A.2d 735 (App. Div. 1959), and *Morris May Realty Corp. v. Board of Chosen Freeholders of the County of Monmouth*, 18 N.J. 269, 277, 113 A.2d 649 (Sup. Ct. 1955), state legislatures have the broadest powers consistent with the above stated requirements in prescribing procedures in eminent domain proceedings.

In *Seacombe* v. *Milwaukee & St. Paul Railway Co.*, *supra*, this Court said (p. 117):

> "It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the Legislature. *There is no limitation upon the power of the Legislature in this respect, if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken.*" (Emphasis added.)

That the matter before this Court is procedural was admitted fifteen times by appellants in their briefs filed in the State Court and again in their Jurisdictional Statement to this Court, page 5, line 10.

The sovereign nature of a condemnation proceeding justifies the legislature's latitude in prescribing the procedure therefor. *United States* v. *Jones*, 109 U.S. 513, 518, 27 L. Ed. 1015 (1883); *Abbott* v. *Beth Israel Cemetery Ass'n of Woodbridge*, 13 N.J. 528, 100 A. 2d 532 (Sup. Ct. 1953).

In the dissenting opinion in the State Court and in all the briefs filed by appellants in these proceedings, the sovereign nature of condemnation proceedings and the legislative prerogative to prescribe condemnation proce-

dures within the framework of the fundamental, substantive rights set forth above have been singularly ignored.

It follows that granting the procedural option to the Port Authority falls squarely within the Legislature's right to prescribe procedural rules and does not violate the substantive rights to which a landowner is entitled when his property is condemned.

The majority of the State Supreme Court emphasized (Jurisdictional Statement, page 8a, line 30) *that the appellants have not claimed that either procedure allowed by the option was unconstitutional, and that appellants have admitted there is no constitutional right to trial by jury in condemnation cases in New Jersey. Therefore, the majority of the court concluded that no fundamental or substantial right was invaded by the procedural option and N. J. S. A. 32:1-132 is perfectly valid. The same reasoning obviously applies to a discussion for the purposes of this Court's jurisdiction of the substantiality of any right allegedly denied.*

Thus, appellants, in the light of the above, in effect admit that they had notice and opportunity to be heard before a competent tribunal in a proceeding which afforded them adequate means to have the just compensation to which they are entitled determined and that they have in fact received just compensation for their property. Nevertheless, appellants insist that some fundamental right has been denied to them.

This elusive right allegedly denied appellants remains undefined after the filing of numerous briefs and oral argument in the State Courts. *No showing has been made of*

prejudice to the appellants, substantial or otherwise, resulting from the Port Authority's exercise of its option.

On the other hand, as the majority of the State Supreme Court has noted (Jurisdictional Statement, page 15a, line 24), there are many instances in which state agencies in the exercise of the sovereign power of eminent domain, have exercised similar authority to choose one of two or several constitutional procedures. The State Supreme Court observed (Jurisdictional Statement, page 13a, line 30) that though the words "at the option of" may have been omitted in the statutes concerned, the inclusion or exclusion of that phrase has no moment.

Additional cases in which the discretionary resort to optional procedures by administrative agencies has been sustained, in addition to those set forth by the majority in its opinion (Jurisdictional Statement, page 15a, lines 31, *et seq.*) are *Kohl* v. *United States*, 91 U. S. 367, 375, 23 L. Ed. 449 (1876) and *Vanneck Realty Corp.* v. *City of New York*, 259 App. Div. 461, 19 N. Y. S. 2d 544, *rehearing denied* 259 App. Div. 1001, 20 N. Y. S. 2d 984, *aff'd* 284 N. Y. 403, 31 N. E. 2d 505, *rehearing denied* 285 N. Y. 607, 33 N. E. 2d 542 (1st Department, 1940).

Countless procedural options exercisable by only one litigant in a court proceeding exist throughout the nation, the constitutionality of which, either from the standpoint of the equal protection clause or otherwise has never been doubted. For example, in New Jersey a plaintiff in an ordinary civil action not concerning real property, may select a forum. He may sue a defendant in a civil action in the County Court of the county in which the defendant resides or he may sue in the Superior Court, laying the

venue in the county in which the cause of action arose or in which any party to the action was resident at the time of the commencement of the action. Superior Court: N. J. Constitution, Art. VI, Sec. 3, Par. 2, R. R. 4:3-2; County Court: N. J. Constitution, Art. VI, Sec. 4, Pars. 1 and 5, R. R. 5:2-1.

New Jersey Rules of Practice 4:39-1 and 7:8-1 in effect provide that any party to a court proceeding may demand a jury trial in issues triable of right by a jury thereby resorting to a procedural option which in effect defeats the wishes of a party litigant who does not desire to have a trial by jury. (Of course, there is no right to trial by jury in New Jersey condemnations). A holding by this Court that the procedural option here afforded the Port Authority is unconstitutional would generate a never ending stream of litigation relative to the constitutionality of procedures similar to those above set forth with which the every day operations of courts throughout the country are concerned. The fact is that the moving party in almost all types of litigations has various procedural options which his adversary lacks. The adversary would only have a constitutional objection if he showed that the procedural option exercised was itself unconstitutional.

From the early Nineteenth Century to the present, it is a foreclosed question that property owners are not entitled to jury trials in New Jersey in condemnation proceedings. *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 724 (Ch. 1832); *Town of Montclair* v. *Stanoyevich*, 6 N. J. 479, 484, 79 A. 2d 288 (Sup. Ct. 1951).

Likewise this Court has early held that there is no Federal constitutional right to trial by jury in condemnation cases. *Kohl* v. *United States, supra* (p. 376).

To afford the procedural option to select one of two perfectly constitutional procedures, one of which provides for a jury trial on appeal, the status of a substantial and fundamental right, gives an incident of a jury trial a status that a jury trial itself does not enjoy in condemnation proceedings. *Peirson* v. *Boston El. Ry. Co.*, 191 Mass. 223, 77 N. E. 769, 772 (Sup. Jud. Ct. Mass. 1906).

In their Jurisdictional Statement, pages 11 and 12, appellants have criticized some of the cases relied on by the Port Authority and the majority of the State Court to sustain the classification employed by the New Jersey Legislature in granting the Port Authority the option in question.

Dohany v. *Rogers*, *supra*, specifically held that the fact that condemnation was being exercised on behalf of the State was in and of itself sufficient reason for the placing of the condemnor in a separate class. True the classification there was between the State Highway Commission and a private railroad. However, the important consideration is that the basis for the separate classification was that the condemnation was being carried out by the State Highway Commission. As in *Dohany*, noted by the majority opinion below (Jurisdictional Statement, page 18a, line 26) the appellee also is an important state agency justifying separate treatment.

Appellants also criticize the citation of *United States* v. *Burnison*, 339 U. S. 87, 94 L. Ed. 675 (1950), on the ground that the placing of a State in a separate class in that case was justified by reason of the State's close relationship with its residents and their property. As the Port Authority pointed out in its briefs in the State Court, what closer relationship can exist than that between the State and its agency exercising the sovereign power of eminent domain?

Appellants criticize the Port Authority's application of *Putman* v. *Ford*, 155 Va. 625, 155 S. E. 823 (Sup. Ct. of App., Va., 1930). They contend that the separate classification of the Tax Commissioner which gives him a procedural option to be re-heard in the trial court as a matter of right, without according the same right of rehearing to the property owners was justified by the court on the ground that the Tax Commissioner often only received constructive notice of the pending proceedings and therefore should have the option to have the case reheard as of right.

Appellants ignore the fact that among the bases for the court's sustaining such a procedure in *Putnam* was its finding that the option injured no one (p. 824).

Likewise the procedure exercised by the Port Authority in the instant case, has injured no one. In fact, appellants nowhere state what they consider their injuries to be.

In classes of cases which permit constructive notice, private litigants who do not receive actual notice are not entitled to be reheard as of right. Therefore, the only conclusion to be drawn from the *Putnam* case is that the State was preferred as to a procedural matter which harmed no one, because the State and taxpayers inherently "are in widely different classes".

United States v. *Heinze, supra*, is also criticized by appellants. This was a criminal case in which the United States had the option of interlocutory appeal, whereas the appellant did not. It was there held that Congress could properly classify the United States in matters of procedure. In other words, the United States was preferred procedurally and such preference was deemed justified as a

valid classification between litigants even in a criminal proceeding. A procedural option in a condemnation proceeding like the instant case would appear to be an *a fortiori* situation.

The quotation on page 12, line 4, of appellants' Jurisdictional Statement merely states the broad general rule in classification cases that "persons similarly circumstanced shall be treated alike."

The Port Authority does not take issue with this statement but maintains as it has throughout these proceedings that it and the property owners are not in similar circumstances and that the classification of the Port Authority separately as to a matter of procedure which does not result in prejudice to the landowner is entirely justified.

The quotation above referred to purportedly comes from the *Heinze* case. However, this quotation does not appear in that case. Apparently the *Putnam* case was appellants' source for the quotation but the quotation was there attributed to *Ohio Oil Co. v. Conway*, 281 U. S. 146, 74 L. Ed. 776 (1930) not to the *Heinze* case. However, the legal principle of the *Heinze* case governs these appeals.

A materially incomplete quotation from 12 Am. Jur. 241, Section 543, appears on page 9 of appellants' Jurisdictional Statement to this Court.

The full quotation reads:

> "Generally. Generally speaking, equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected if such a course also

would be applied to any other person in the state under similar circumstances and conditions.

"Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. The Supreme Court at an early date recognized the rule that an act of the legislature which in terms would give to one individual certain rights and the benefit of certain modes of procedure and would deny to another similarly situated the same rights could be challenged successfully on the ground of unjust discrimination and denial of the equal protection of the laws. Thus, a statute which denies to the laboring man equal access to the courts denies the equal protection of the laws. Whatever may be his social and economic condition outside, when he enters the court, the law can permit no rule to fetter him in the prosecution of his claims or the preservation of his rights which does not apply equally to all others respecting the same kinds of claims and rights.

"*The Fourteenth Amendment was not intended to deprive the states of their power to establish and regulate judicial proceedings, and its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation.* The equal protection of the laws guaranteed by this amendment in respect of legal proceedings does not require that every person in the land shall possess the same rights and privileges as every other person, and hence does not forbid proper and

reasonable classifications in the field of court proceedings. This amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies, whether as between states or as between different sections of the same state. A provision in a state Constitution, however, to the effect that the legislature shall not pass any local or special law regulating the practice or jurisdiction of the courts is a specific limitation, and because of it the practice or jurisdiction as prescribed by statute cannot be different in the courts of such a state in any class of localities from what it is elsewhere in the state. The reason for the rule is that the right to redress of any wrong in the courts is a personal one unaffected by the place of residence." (Emphasis added.)

In addition to the above authorities, several reasons were in fact given by the majority of the State Court for the separate classification.

On page 19a, line 5 of the Jurisdictional Statement, the majority points out that "there are other realistically conceivable reasons for special treatment for the Authority in this field." These reasons dispose of appellants' argument that there is no basis or standard for the exercise of the Port Authority's option (Jurisdictional Statement, page 14, line 36). Among such reasons, the majority of the State Supreme Court noted that there would be times when complex problems of administration and valuation would be more ably met by the procedure in N. J. S. A. 32:1-35.15, et seq. as impliedly opposed to times when less complex valuation and administrative problems might very well be best met by resorting to Title 20. The majority noted that in the instant condemnation proceedings more than 40

tracts were the subject of acquisition. The properties acquired were of many different types and sizes with concurrent complex problems of valuation. The majority's consensus was that in such a situation "greater expedition and quicker understanding may be expected from an experienced judge than from a jury of laymen." (Jurisdictional Statement, page 19a, line 26).

Also, the majority states "* * * the choice of locale for construction is limited to the Port vicinity at points on opposite sides of the River, making coordination necessary in the expropriation proceedings." (Jurisdictional Statement, page 19a, line 12).

The majority summed up its reasoning on classification (Jurisdictional Statement, page 19a, line 17) as follows:

> "'Accordingly, we believe sufficient factors are present to support the legislative judgment that the Authority should be classified sparately for eminent domain procedure purposes. More particularly, in the light of the whole problem, establishment of the alternative modes of proceeding and in giving the Authority the option of selecting the one to be followed cannot be regarded as being without any reasonable justification."

In addition, there is a historical basis for the retention of the option. N. J. S. A. 32:1-35.15 was an innovation in New Jersey condemnation procedure, and therefore it was considered advisable by the Legislature to retain the long established alternate procedure provided by Title 20.

As opposed to the many authorities and reasons cited in the majority opinion and herein in support of appellee's position, neither the State Court minority nor the appel-

lants have cited a single affirmative case holding that such a procedural option deprives them of any substantial or fundamental right.

Appellants have attempted to bring procedural rights generally within the purview of constitutional protection by citing *Bogni* v. *Perotti*, 224 Mass. 125, 122 N. E. 853 (Sup. Jud. Ct. Mass. 1916) and *Traux* v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254 (1921). However, as the Port Authority pointed out in its briefs before the State Court, these cases dealt with early prohibitions of injunctions in labor disputes. Based on the findings of the respective appellate courts that injunctive relief protected the employer's right to conduct a business which was held to be a fundamental right protected by the Constitution, the legislation prohibiting the resort to such relief was condemned.

As emphasized many times in this memorandum and in prior briefs before the State Courts the sovereign nature of the proceedings and the lack of any prejudice, let alone substantial prejudice, to the property owner justifies the classification.

The entire question before this Court was summed up ably by the majority of the State Court when they said (Jurisdictional Statement, page 212, line 12):

> "* * * the clauses of the federal and state constitutions on which defendants rely do not prohibit a state from establishing different rules of procedure in eminent domain cases for different classes of cases or of litigants, provided the variations relate merely to matters of procedure, and do not operate to deprive any property owner of substantial equality in the adjudication of his rights."

The Port Authority respectfully submits there is no substantial Federal question before this Court.

POINT II.

Appellants have not complied with Rule 15 (1) (d) and (e) relating to the substance of the Jurisdictional Statement.

The burden of establishing that this Court has jurisdiction is upon the appellants. *Zucht* v. *King*, 260 U. S. 174, 176-177; 67 L. Ed. 194, 198 (1922).

In *Sugerman* v. *U. S.*, 249 U. S. 182, 184, 63 L. Ed. 550, 551 (1918), Mr. Justice Brandeis speaking for the Court said:

> "* * * mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question substantial in character and properly raised below."

Specifically, the Port Authority contends that the technical requirements of this affirmative burden were not fulfilled by appellants because they failed under Rule 15 (1) (d) to "specify the stage in the proceedings in the Court of first instance * * * at which, and the manner in which, the federal questions sought to be reviewed were raised: * * *"; and that pursuant to *Zucht* v. *King*, *supra*, they have failed completely, as we have shown above, to demonstrate that the Federal question here presented is substantial.

Rule 15 (1) (e) provides:

> "If the appeal is from a state court, there shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht* v. *King*, 260 U. S. 174, 176, 177, 43 S. Ct. 24, 25), which shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain the jurisdiction (subparagraph (b) (iv) hereof), and shall include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution."

These requirements are patently lacking on these appeals not only as a matter of substance but also because the Jurisdictional Statement which appellants submitted to this Court contained no attempt to comply with the specific requirements set forth in Rule 15 (1) (e). That appellants have assumed they possess a right to appeal to this Court irrespective of the substantiality of the federal question they raise is seen from the following statement in their Jurisdictional Statement (page 2, line 27):

> "It appears settled that a judgment of the highest court of a state against the contention of a party that a particular state statute violated the Fourteenth Amendment of the United States Constitution would entitle that party to an appeal as to the constitutional issue on its merits in accordance with said statutory provision."

Thus it is clear that appellants have ignored the requirement of this Court's rule that they show affirmatively the substantiality of the federal question which they wish this Court to review.

A mere reading of the two cases, *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94, 97 L. Ed. 120 (1952), and *Winters* v. *People of the State of New York*, 333 U. S. 507, 92 L. Ed. 840 (1947), relied on by appellants to sustain the substantiality of their alleged constitutional issue, have, in fact, nothing to do with the preliminary question of jurisdiction which must first be decided by the Court. Those cases deal with the merits of Fourteenth Amendment protections as applied to a State's denial of freedom of religion in the former case and freedom of the press in the latter.

Neither case deals with the preliminary determination of what is a substantial question to sustain this Court's jurisdiction.

Neither does the argument portion of the Jurisdictional Statement establish the substantiality of the question presented otherwise than by conclusion. No reasons are given.

Thus the technical requirements of Rule 15 relating to the content of the Jurisdictional Statement have not been met.

POINT III.

The question presented by these appeals was not timely or properly raised in the trial court and in consequence thereof has become moot.

Whether a federal question was sufficiently and properly raised in the State Court is itself a federal question, in the decision of which this Court is not concluded by the view taken by the highest court of the State. *Carter* v. *Texas*, 177 U. S. 442, 447; 44 L. Ed. 839 (1899); *Erie Railroad Co.*

v. *Purdy*, 185 U. S. 148, 152; 46 L. Ed. 847 (1902); *Davis* v. *Wechsler*, 263 U. S. 22, 24; 68 L. Ed. 143, 145 (1925); *Davis* v. *O'Hara*, 266 U. S. 314, 318; 69 L. Ed. 303 (1923). Certainly, this Court is interested in making certain that federal constitutional objections are not belatedly raised in the state courts.

As noted above, process in these proceedings specifically directed appellants to state their objections both to the title vesting provisions and to the just compensation procedure outlined in the complaint. In failing to make any such objections, appellants waived whatever rights they might have had to appeal from the trial court's order vesting title in the Port Authority.

A year-and-a-half later at the trial on the issue of just compensation, appellants raised for the first time their constitutional objection. The present appeals are thus from the condemnation awards. However, while appealing from the awards, appellants nowhere claim that the sums awarded them do not constitute just compensation for their property. Moreover, by not having made a timely objection to the order vesting title in the Port Authority, appellants have been forced to disclaim any attempt to have title revested in them. In other words, success for appellants would mean that the statute whose constitutionality they challenge would have to be judicially re-written to provide that the issue of just compensation could only be decided by a jury. This, of course, is directly contrary to the statute's clear and unambiguous terms.

The inescapable fact is that if the challenged option is stricken as unconstitutional, it will be impossible for this or any court to tell which of the two alternative procedures the New Jersey Legislature would have chosen. No court

possesses a warrant to make this type of legislative determination. In passing upon the validity of statutes, the judiciary cannot usurp the functions of the Legislature in deciding questions of policy—in our case determining which of two admittedly constitutional procedures the Legislature would desire to have the Port Authority employ in its condemnation proceedings for the George Washington Bridge.

Furthermore, what appellants are, in effect, asking this Court to hold is that they and not the Port Authority be given the option to determine which of the two alternative procedures should be employed for George Washington Bridge condemnation purposes. Assuming solely for the sake of argument, that appellants are correct in their equal protection argument and the option given the Port Authority is invalid, it follows that the same logic must, of necessity, invalidate an identical option in the appellants for the same reason.

In view of the above, it is clear that appellants, by failing to make a timely constitutional objection, have deprived themselves of any relief on these appeals which it is within the judicial power of this Court to grant. The constitutional question which appellants raise is therefore moot. Dispositive of this question is the recent statement by this Court in *Local No. 8-6 v. Missouri*, 361 U. S. 363, 4 L. Ed. 2d 373, 376 (1960):

> "Whatever the practice in the * * * [state court], the duty of this Court '*is to decide actual controversies by a judgment which can be carried into effect*, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (Emphasis added.)

Conclusion.

Appellee respectfully requests therefore that the appeals be dismissed for the reasons that appellants have not presented a substantial question for the decision of this Court; that they have not complied with Rule 15 of this Court by failing to show affirmatively that this Court should take jurisdiction; and that they did not raise the constitutional question timely in the trial court thereby rendering the question moot.

Respectfully submitted,

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Dated: May 8, 1961.

APPENDIX.

Pertinent Statutes.

20:1-9. COMMISSIONERS; OATH; DUTIES.

The commissioners shall take and subscribe an oath faithfully and impartially to examine the matter in question and make a true report according to the best of their skill and understanding. Thereafter they shall meet at the time and place appointed and proceed to view and examine the land or other property and make a just and equitable appraisement of the value of the same, and an assessment of the amount to be paid by the plaintiff for the land or other property and damages as aforesaid, as of the date of the commencement of the action for condemnation.

20:1-16. APPEAL.

The plaintiff or owner of any of the land or other property, or any person interested may appeal from the report of the commissioners to the Superior Court, whether or not an appeal has been or may be given by the statute conferring the power to take land or property for public use.

20:1-20. JURY TRIAL ON APPEAL.

The appeal shall be tried by a jury upon the demand of any party to the appeal.

N. J. S. A. 32:1-35.9(c):

(c) Unless otherwise provided by law by the State in which such real property is located, the Port Authority shall not have power to acquire for air terminal purposes by condemnation or the right of eminent domain subsequent to June thirtieth, one thousand nine hundred and

fifty-two, any real property taken for and actually devoted to a public use; *provided,* that this limitation shall not apply to real property a proceeding for the acquisition of which was initiated prior to that date.

The foregoing limitations shall not be construed to limit, affect or impair the power of the Port Authority to acquire real property at any time and place for air terminal purposes by negotiation or in any other manner than by condemnation or the exercise of the right of eminent domain.

Subject to the foregoing limitations, if the Port Authority shall find it necessary or convenient to acquire any real property for air terminal purposes, whether for immediate or future use, the Port Authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination the said property shall be and shall be deemed to be required for such public use until otherwise determined by the Port Authority, and such determination shall not be affected by the fact that such property has theretofore been taken for and is then devoted to a public use; but the public use in the hands or under the control of the Port Authority shall be deemed superior to the public use in the hands of any other person, association or corporation. The Port Authority may acquire and is hereby authorized to acquire such property, whether a fee simple absolute or a lesser estate, by condemnation or the exercise of the right of eminent domain under and pursuant to the condemnation law of the State of New York, in the case of property located in such State, and Revised Statutes of New Jersey, Title 20:1-1 et seq., in the case of property situated in such State, or at the option of the Port Authority pursuant to such other and alternate procedure in each State as may be provided by law by such State. The Port Authority shall have such power of condemnation or eminent domain (not

only in respect to real property located within the Port of New York District but also as to any real property located outside of the Port District which is necessary, incidental or convenient for the effectuation, establishment, acquisition, construction, rehabilitation or improvement, and maintenance and operation of air terminals within the Port District. Nothing herein contained shall be construed to prevent the Port Authority from bringing any proceedings to remove a cloud on title or such other proceedings as it may, in its discretion, deem proper and necessary, or acquiring any such property by negotiation or purchase.

In the event the Port Authority shall deem that the use by it of any real property for any purpose hereunder will be necessary either immediately or by a definite future date, it may file with any petition in any condemnation proceeding brought pursuant to law or at any time thereafter a notice that it requires the possession thereof, either immediately or at a date specified in such notice. In such event, the Port Authority shall cause a duplicate of such notice and an affidavit of the filing thereof to be recorded in the office in which deeds are required to be recorded in the county wherein the land involved is situated and upon such recording the Port Authority may enter upon and shall be entitled to the possession, use and occupation of such real property at the time specified in said notice without suit or other judicial proceedings; *provided*, that it shall first deposit with the court a sum equal to the assessed valuation of such real property, or in the event that the assessed valuation thereof cannot be readily ascertained such sum as in the judgment of the Port Authority shall be sufficient as compensation for the real property acquired. The sum so deposited with the court shall be applied to the satisfaction of any award thereafter made in any condemnation proceeding. Such filing and recording of said notice shall be conclusive evidence of the entry upon and appropriation

of said property by the Port Authority, and title to said property shall vest in the Port Authority on the date specified in such notice.

N. J. S. A. 32:1-35.15(i):

(i) After all parties who have filed verified claims, as provided in sub-division (g) hereof, have proved their titles, or have failed to do so after being notified by the Port Authority of the time and place where such proof of title would be received, the Port Authority shall bring on before the Superior Court, as the court may direct, a hearing upon the claims so filed, or in case no claims are filed, to fix the amount to be paid for such lands.

The court shall determine without a jury, and with or without a view of the real property being acquired, the compensation which should justly be made by the Port Authority to the respective owners of such real property, and judgment shall be entered in the amount so determined.

N. J. S. A. 32:1-35.33:

32:1-35.33 CONDEMNATION PROCEEDINGS, ACQUISITION OF REAL PROPERTY BY.

If for the purposes of establishing marine terminals or purposes incidental thereto, including temporary construction purposes, the Port Authority shall find it necessary or convenient to acquire any real property as herein defined, whether for immediate or future use, the Port Authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination the said property shall be and shall be deemed to be required for such public use until otherwise determined by the Port Authority.

The Port Authority may acquire and is hereby authorized to acquire such property, whether a fee simple

absolute or a lesser estate, by condemnation or the exercise of the right of eminent domain under and pursuant to the Revised Statutes of New Jersey, Title 20:1-1 et seq., or at the option of the Port Authority as provided in section fifteen of chapter forty-three of the laws of one thousand nine hundred and forty-seven for the condemnation of real property for air terminal purposes, or pursuant to such other and alternate procedure as may be provided by law. Nothing herein contained shall be construed to prevent the Port Authority from bringing any action to remove a cloud on title or such other actions as it may, in its discretion, deem proper and necessary, or acquiring any such property by negotiation or purchase.

In the event the Port Authority shall deem that the use by it of any real property for any purpose hereunder will be necessary either immediately or by a definite future date, it may file with any complaint in any action for condemnation brought pursuant to law or at any time thereafter a notice that it requires the possession thereof, either immediately or at a date specified in such notice. In such event, the Port Authority shall cause a duplicate of such notice and an affidavit of the filing thereof to be recorded in the office in which deeds are required to be recorded in the county wherein the land involved is situated and upon such recording the Port Authority may enter upon and shall be entitled to the possession, use and occupation of such real property at the time specified in said notice without judicial proceedings: *provided*, that it shall first deposit with the court a sum equal to the assessed valuation of such real property, or in the event that the assessed valuation thereof cannot be readily ascertained such sum as in the judgment of the Port Authority shall be sufficient as compensation for the real property acquired. The sum so deposited with the court shall be applied to the satisfaction of any award thereafter made in any action for con-

demnation. Such filing and recording of said notice shall be conclusive evidence of the entry upon and appropriation of said property by the Port Authority, and title to said property shall vest in the Port Authority on the date specified in such notice. The power of the Port Authority to acquire real property by condemnation hereunder shall be a continuing power, and no exercise thereof shall be deemed to exhaust it.

Nothing herein contained shall be construed to permit the taking by the Port Authority of any property owned by any railroad or railway corporation, or by any other corporation, which is a "public utility" as defined in section 48:2-13 of the Revised Statutes, and devoted to use by such corporation in its operations, or acquired prior to the effective date of this act and held for such use, without the authority or consent of such corporation.